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IN THE

Supreme Court of the United States

October Term, 1992

ANN RICHARDS, GOVERNOR OF TEXAS; CAROL S. VANCE, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, R. H. DUNCAN, SR., GILBERTO HINOJOSA, JOHN R. WARD, MEMBERS, TEXAS BOARDOF CRIMINAL JUSTICE; AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Petitioners

v.

JON LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, AND JERRY EVERSOLE, HARRIS COUNTY COMMISSIONERS; and JOHNNY KLEVENHAGEN, HARRIS COUNTY SHERIFF,

Respondents

v.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE' J. PINA, II, PAT REED, AND WESLEY SELLERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ALBERTI, ET AL. (PLAINTIFFS-INMATE CLASS)

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June 1, 1993

QUESTIONS PRESENTED

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide questions of state law which have only been addressed by state lower courts, where the parties to the dispute in federal court include two levels of state government (in addition to other non-governmental parties) and state fiscal policy and complex regulatory schemes are impacted by the federal court's ruling, at least where it is possible to afford relief to the non-governmental party without resolving the dispute between the two branches of state government?

2. Whether a federal court's order that requires state officials, who have been found to have acted with deliberate indifference to the serious needs of convicted inmates, to participate in the elimination of ongoing constitutional violations by funding part of the prospective relief decreed is in violation of the Eleventh Amendment where there would be no constitutional constraint against requiring the other defendants in the case to provide (and pay for) the entire remedy themselves?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the state supreme court, questions of state law concerning the meaning of subsequently superseded state law, where the state's lower courts have interpreted the superseded law, but the state's appellate courts have not done so, and the parties to the dispute in federal court include two levels of state government (in addition to other non-governmental parties), state fiscal policy and complex regulatory schemes are impacted by the federal court's ruling, and it is possible to afford interim relief to the non-governmental party (without finally resolving the dispute between the two branches of state government) while the state appellate courts consider the state law issues?

4. Whether state officials can possess the requisite culpable mental state of mind to be found liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991), where they knew that the consequences of their official policies would be to condemn state-ready prisoners and other inmates to be subjected to objectively cruel and unconstitutional conditions in the local jail and at least five lower court decisions had established that they had a duty to remove prisoners from those conditions, but no state appellate court had specifically so held?

5. Whether the Due Process Clause, of its own force, requires minimal standards for the confinement of pretrial detainees, apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, which are not necessarily satisfied simply by jailers refraining from acting with "deliberate indifference" to the serious needs of inmates?

Stated alternatively, whether the "deliberate indifference" standard articulated in *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991) and other Eighth Amendment cases, is applicable in cases involving the treatment, housing, and constitutional rights of pretrial detainees?

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Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS LAWRENCE R. ALBERTI, OTHER NAMED PLAINTIFFS, AND THE CLASS OF PRESENT AND FUTURE INMATES IN THE JAILS OF HARRIS COUNTY, TEXAS

Respondents Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, and Wesley Sellers, individually and on behalf of all present and future inmates of the Harris County jails, respectfully request that this Court deny the petition for a writ of certiorari filed by Ann Richards, Governor of Texas, the members of the Texas Board of Criminal Justice, and the executive director of the Texas Department of Criminal Justice that seeks review of the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 978 F.2d 893 (5th Cir. 1992). That opinion affirmed the district court's unreported memorandum order of August 7, 1991, attached to the petition for a writ of certiorari as Appendix C. That decision, in turn, had resulted from a remand from the fifth circuit by a ruling reported at 937 F.2d 984 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1994 (1992), which had reviewed the district court's unreported memorandum opinion of September 25, 1989 (attached to the petition as Appendix Y). The district court's liability ruling has resulted in a series of remedial orders which are attached to the petition for a writ of certiorari.

Other significant decisions rendered in this case are reported at 903 F.2d 352 (5th Cir. 1990) (attorney's fees issues), 896 F.2d 927 (5th Cir. 1990) (attorney's fees

issues), 799 F.2d 992 (5th Cir. 1986), 790 F.2d 1220 (5th Cir. 1986), 688 F. Supp. 1210 (S.D. Tex. 1987) (attorney's fees issues), 688 F. Supp. 1176 (S.D. Tex. 1987) (attorney's fees issues), 660 F. Supp. 605 (S.D. Tex. 1987), 610 F. Supp. 138 (S.D. Tex. 1985), 606 F. Supp. 478 (S.D. Tex. 1985), 600 F. Supp. 443 (S.D. Tex. 1984), and 406 F. Supp. 649 (S.D. Tex. 1975).

STATEMENT OF THE CASE

Indifferent to the role of the plaintiffs-respondents (the inmates of the jails) in this litigation, petitioners mischaracterize this lawsuit as simply "an internal dispute between the Texas legislature and the counties of Texas over whether counties should be compensated for housing inmates ready for transfer to the state prison system". Petition for Certiorari at p. 16. If that were really what this case is all about, federal court involvement would indeed be inappropriate (and, of course, the fourth Question Presented by petitioners in the petition for certiorari would be irrelevant).

The truth is that this is not simply some internecine battle over money between two levels of state government. Rather, it is a case about inmates in a severely overcrowded county jail being subjected to conditions of incarceration which everyone concerned concedes contravene the constitution of the United States.

Accordingly, plaintiffs-respondents do not accept the petitioners' assertion that, "The only real dispute in this case has been between the State and County Defendants". Petition for Certiorari at pp. 6-7. The "real dispute" revolves around the fact that Harris County's jails are (and have been) so egregiously overcrowded that the jailers cannot provide for the basic necessities of human existence and the constitutional rights of inmates have been flagrantly violated for many years. The immediate cause of

these intolerable conditions is that the petitioners repeatedly made deliberate decisions (commencing in 1987) to leave certain convicted "state-ready" felons in the Harris County jails, rather than accepting them into the state prison system, knowing that conditions in the jails were "objectively cruel", *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984, 999 (5th Cir. 1991), at the time.

Thus, this is a dispute between the inmates of the unconstitutionally overcrowded Harris County jails and the governmental officials (state and local—including the petitioners) who have chosen deliberately to subject them to these intolerable and inhumane conditions. It is not simply, as petitioners suggest, some inter-governmental battle between a state and its counties.[1]

Much of petitioners' "Statement of Facts" is argumentative rather than factual. Accordingly, and in the interests of brevity, plaintiffs-respondents incorporate by reference the factual recitals contained in the fifth circuit's opinions, especially at 937 F.2d at 986-92. These respondents would add only the following.

No one disputes the fact that the Harris County jails are (and throughout the relevant time frame involved in this case, were) egregiously objectively unconstitutional. Indeed, the petitioners' own expert, Mr. Martin testified,

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[1] Indeed, if this case were really only a dispute between the petitioners and the county defendant-respondents, the fourth Question Presented in the petition for certiorari would be irrelevant. The *Wilson v. Seiter* issue relates exclusively to the question whether or not these petitioners are liable to the inmate respondents, not to whether or not they are liable to the county defendants-respondents. There are no "rights" of the county defendants-respondents which are violated (or not transgressed) depending on the mental state of the petitioners toward the inmate respondents.

"[T]hat is the most egregious crowding in a confinement facility that I personally have witnessed, which includes touring [100 to 200] confinement facilities over [an] eighteen, nineteen year period. . . . It is one of the few instances in which I without qualification would render an opinion that it's in violation of the eighth amendment, as I understand the eighth amendment and the correctional law." Tr. Sept. 15, 1989 at pp. 135-137.

Petitioners' counsel, Mr. Ozer, agreed:

Mr. Ozer:	"I viewed the jail conditions, Judge. They are horrible.
The Court:	But are they unconstitutional?
Mr. Ozer:	Are you asking me for my conclusion?
The Court:	I am asking you for your commitment for your client.
Mr. Ozer:	I believe the conditions of confinement in the Harris County jail are unconstitutional."

Tr. Sept. 13, 1989 at 7-8.

The county defendants-respondents concurred, admitting that conditions within the Harris County jails were "beyond constitutionally acceptable limits". County Defendants' Opposition to State Defendants' Petition for Writ of Mandamus or Prohibition at p. 67; County Defendants' Opposition to State Defendants' Application for Stay at pp. 26, 30, 37; County Defendants' Brief filed March 21, 1991 at p. 71.

Thus, it is common ground that conditions in the Harris County jails are (and throughout this litigation were)

objectively unconstitutional. Those conditions are so egregious that they have actually resulted in loss of life. Findings of Fact No. 20, Sept. 25, 1989. That much is not in dispute in this litigation.

It is also established (though this finding is contested by the petitioners) that the objectively unconstitutional condition of the jails is the result of deliberate indifference to the serious needs of inmates by both the petitioners and the county defendants-respondents. Order, Aug. 7, 1991, *aff'd, Alberti v. Sheriff of Harris County, Texas*, 978 F.2d 893 (5th Cir. 1992); *see also, Alberti v. Sheriff of Harris County*, 937 F.2d 984, 999 (5th Cir. 1991) (finding "strong if not compelling evidence of deliberate indifference to the plight of these ready-felons"). Thus, under *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), both the petitioners and the county defendants-respondents were found to have violated the constitutional rights of inmates in the Harris County jails.

Having found constitutional violations, the court undertook to fashion a remedy. Since the root cause of the admitted unconstitutionality was flagrant overcrowding in the jails, the court simply mandated that a certain number of prisoners be removed from the Harris County facilities and transferred to available empty cells in other counties. The court further directed that the petitioners participate in that *prospective* relief by paying for the costs of using those cells in other counties. It is that order which the petitioners claim violated the Eleventh Amendment and principles of federalism.

In this context, the insubstantiality of the petitioners arguments and the consequent inappropriateness of a grant of certiorari in this case are readily apparent.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S DECISIONS PROPERLY APPLY PRINCIPLES OF FEDERALISM, ABSTENTION, CERTIFICATION, AND ELEVENTH AMENDMENT IMMUNITY

The Fifth Circuit's carefully reasoned decisions in this case are soundly based, consistent with this Court's decisions, correctly deferential to state interests and processes, and appropriately responsive to the admitted substantial constitutional violations confronted by the courts. They therefore should not be subject to further review.

A. The Fifth Circuit Correctly Ruled That The Eleventh Amendment Provides No Bar To A Federal Court Ordering Prospective Relief to Eliminate Currently Existing Unconstitutional Conditions

Petitioners characterize the directive that they pay for the costs of housing prisoners transferred from unconstitutionally overcrowded Harris County jails to available cells in other counties as an order that the state "compensate one of its political subdivisions . . . in violation of the Eleventh Amendment". Petition for Certiorari, Questions Presented No. 2, at p. 17 n. 15. Although the Eleventh Amendment precludes an order requiring a state defendant to use state funds to make reparations for *past* misconduct, state officers are not immune from being required to effectuate *prospective* relief from currently unconstitutional conditions, even if the remedial order entails substantial financial consequences. *Hutto v. Finney*, 437 U.S. 678 (1978); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Will v. Michigan Department of State*

Police, 491 U.S. 58, 71 n. 10 (1989); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985).

Milliken v. Bradley, is a good example of this principle. In that case, this Court rejected an Eleventh Amendment defense and approved an injunction ordering the state to pay almost $6,000,000 to help defray the cost of desegregating the Detroit school system. Significantly, that case involved a situation, precisely equivalent to the one at bar, in which the state was ordered to share the cost of prospective relief with the local governmental defendant.

Similarly, in *Missouri v. Jenkins*, 495 U.S. 33, 56 n.20 (1990), this Court endorsed the ruling of the district court directing the state to furnish $27,000,000 toward a $37,000,000 capital improvement program decreed as part of a comprehensive school desegregation plan. "The Eleventh Amendment does not bar federal courts from imposing on the States the costs of securing prospective compliance with [an order remedying unconstitutional conditions]," the Court decreed, even when complying entails the expenditure of millions of dollars of state funds. *Id.*

The main flaw with the petitioners' Eleventh Amendment argument results from their mischaracterization of the court's remedial order. The district court did not undertake to "tell a state that it must compensate its counties", Petition for Certiorari at p. 17, n. 15, for damages sustained by that governmental entity; rather he sought to provide *the plaintiffs* prospective relief from the unconstitutional conditions to which they were (and are) being subjected as a result of the petitioners' deliberate decision to leave ID-ready convicted felons confined in Harris County jails, rather than removing them to the state penitentiary. Such an order presents no Eleventh Amendment issue at all.

B. The District Court and the Court of Appeals Adequately and Appropriately Deferred To State Court Rulings on State Law Questions and No Further "Abstention" Was Required In This Case, Especially Since the Law In Question Has Been Superseded

Petitioners claim that the federal courts should have abstained in this case because there was allegedly "real ambiguity" concerning the meaning of certain aspects of state law "*prior to the passage of H.B. 93*". Petition for Certiorari at p. 21 (emphasis added). Whatever force that argument might have had "prior to passage of H.B. 93", enactment of that legislation moots the issue. Certainly certiorari should not be granted to review a lower court decision declining to abstain in a constitutional controversy where the issue sought to be remanded to the state courts is the construction of a law that has since been superseded.

Moreover, in this case the federal courts *did* defer to controlling state court decisions unambiguously construing the allegedly "uncertain" provisions of state law. In *County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas) and *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas), the state district court had rendered declaratory judgments construing the relevant aspects of Texas law and concluding that petitioners were indeed responsible, under state law, for removing state-ready prisoners promptly from county jails. The federal district court and the court of appeals expressly deferred to those state court rulings.

Admittedly, the state court decisions were being appealed at the time district court's opinion was announced. That circumstance is of no moment. It is well established that a federal court must give controlling effect to a state lower court ruling until that decision is reversed

on appeal. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); *Rooker v. Fidelity Trust Co.*, 283 U.S. 413, 415 (1923); *Reed v. Allen*, 286 U.S. 191 (1932).

What the district court did here was precisely what the principles of federalism command: it applied state law *as it had then been conclusively construed.* The court did indicate that it would reconsider its rulings if the Texas courts should subsequently reject the existing interpretation of state law. That never occurred.

The federal courts did not venture here into uncharted waters trying to predict how Texas courts would ultimately decide murky questions of state law. Rather, they accepted the state court's pronouncements on the meaning of Texas law as they existed at the time. Moreover, the federal courts' rulings did not interfere with pending state court proceedings in any way. In that context, it is difficult to envision a less intrusive, more deferential (to state judicial processes) approach than the course followed here, other than one which simply abdicates the federal courts' responsibility to remedy acknowledged, undeniable, ongoing constitutional violations.

Petitioners' abstention argument is especially difficult to fathom in view of the district court's *unchallenged* finding that further delay in implementing relief in this case would pose serious "life and death" consequences. Order, March 15, 1991 at p. 1.[2] At the time petitioners claim the federal courts should have "abstained", prisoners were literally dying directly from the effects of intolerable overcrowding in the Harris County jails. Findings of Fact No. 20, Sept. 25, 1989.

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[2] "We are talking here about life and death, and the most fundamental rights of the plaintiff class." Order of March 15, 1991.

"[E]xcessive delay causing significant impairment of constitutional rights is a factor persuading against application of the [abstention] doctrine." *Nissan Motor Corp. in USA v. Harding*, 739 F.2d 1005, 1011 (5th Cir. 1984). In this case, waiting on state court processes, any more substantially than the federal courts actually did here, would have been tantamount to denial of constitutional rights.

Moreover, abstention is proper only if there is a state court forum to which a party can then repair for resolution of the state law issue. There was never a state court lawsuit pending between the plaintiffs (the inmates) and the state defendants premised on state law issues, nor could there be. The inmates do not claim that the state defendants (petitioners) breached a state law duty owed to them (apart from their federal constitutional obligations), so they would be without standing to litigate the state law issues in the state courts. In this context, abstention would be meaningless: there would be no way for plaintiffs-respondents to obtain a state court determination of any state law issue specifically affecting their rights.

Finally, in this case there never was any federal constitutional question the answer to which depended on resolution of unsettled issues of state law. As the court of appeals held that "there is little doubt that both the county and the state [petitioners] knew that conditions of confinement in the county's jails deprived inmates of basic needs. . . . There is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state [petitioners] chose to leave them in the jails." *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984, 998-99 (5th Cir. 1992). There is no "uncertain" state law question lurking in those unchallenged finding and they conclusively demonstrate that petitioners are

constitutional tort-feasors. Therefore, there was no occasion to abstain here.

Petitioners have repeatedly lost before their own courts on the very issues they asked the federal courts to "abstain" from deciding. In these circumstances the species of abstention they propose is not *Pullman*, *Burford*, *Younger*, or *Pennzoil* abstention; it is a new genre entirely which can properly be called "certain defeat abstention".

The federal courts were right to defer to decisive determinations of state law matters by the state courts but to refuse to refrain from ordering a remedy for acknowledged, life-threatening unconstitutional conditions while two other parties litigated their ancillary disputes in some other forum in a case in which the plaintiffs-respondents were not, and could not be, parties. Comity and federalism do not require emasculation of the federal constitution, especially where the law sought to be further construed by the state courts has been subsequently supplanted.

C. The Court Should Not Grant Certiorari To Review The Correctness of The Fifth Circuit's Failure To Certify Questions To The Texas Supreme Court Because The Law Sought To Be Clarified Has Been Superseded

In March of 1991, plaintiffs-respondents recommended to the court of appeals that it certify to the Texas Supreme Court two questions concerning interpretation of H.B. 2335 which, *at the time*, possessed currency in this litigation. Plaintiffs' Response to State Defendants' Petition for Writ of Mandamus and/or Prohibition and Other Relief, filed March 13, 1991; *see also* Plaintiffs'-Appellees' Brief, filed March 22, 1991, at pp. 61-68. The fifth circuit declined to pursue this course, concluding that two state lower court

decisions sufficiently eliminated uncertainty about the meaning of state law as it then existed.

Regardless of whether or not certification might have been warranted or preferable in early 1991, subsequent events have rendered this issue entirely academic—and certainly not "certworthy"—at this time. In the first place, the law about which clarification was sought via certification (H.B. 2335) was supplanted by H.B. 93 later in 1991. Thus, whatever may have been the implications of H.B. 2335 on the state's traditional responsibility to remove convicted felons promptly from county jails, H.B. 93 revised that role significantly, as the petitioners essentially concede. No party to the *Alberti* litigation has ever suggested to any court that some question arising under H.B. 93 should be certified to the Texas Supreme Court. Yet it is the regime of H.B. 93—not that of its predecessor, H.B. 2335—with which the lower courts must now deal in fashioning an appropriate remedy in this case.

In short, the simple answer to the certification issue is that the law was changed by the state legislature in ways that obviated any need to seek enlightenment from the Texas courts concerning the meaning of previously existing, but currently superseded, state law.

Moreover, petitioners could have obtained a state appellate court ruling on these questions, had they really wanted the state appellate courts' guidance on these matters, but they *deliberately* chose not to pursue that course. There were two state court cases in which petitioners were involved (*County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas) and *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas), pending in 1991, in which the district court had rendered declaratory judgments interpreting H.B. 2335. The appeals in those cases were pending before the Texas

Court of Appeals at the time certification was recommended. Rather than pursue those appeals to further explication of Texas law, the petitioners chose to settle those cases and forego appellate court review of the correctness of the trial courts' interpretation of H.B. 2335 (which had been adverse to the petitioners).

Having intentionally abandoned a readily available state court forum to obtain the interpretative ruling it sought by certification, petitioners relinquished any basis for complaining of the federal court's refusal to seek enlightenment from the state court system.

Nothing in the concepts of comity and federalism compels a federal court to put remedy of serious constitutional violations on hold while the parties seek clarification from the state courts of the meaning of a *superseded* state court statute, especially where the party seeking that illumination had the opportunity to obtain it from the state courts itself and chose deliberately to forego that elucidation. In these circumstances certification would not enhance resolution of this controversy, it would simply forestall it.

II. THERE IS NO IRRECONCILABLE CONFLICT BETWEEN THE FIFTH CIRCUIT'S RULING IN *ALBERTI* AND THE SIXTH CIRCUIT'S HOLDING IN *KELLEY V. METROPOLITAN BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE*, 836 F.2D 986 (6TH CIR. 1987)

Petitioners maintain that there is a fundamental conflict between the *Alberti* decision and the opinion of the sixth circuit in *Kelley v. Metropolitan Board of Education*, 836 F.2d 986 (6th Cir. 1987), compelling a grant of certiorari to resolve. No such disharmony exists.

Kelley involved a tagend to a thirty year old school desegregation case in which the school board sought reimbursement from the state for the expenses it had incurred correcting the effects of past—but long since eliminated—*de jure* segregation. The state officials were not "currently doing anything wrong", 836 F.2d at 990, and the original plaintiffs (the school children) were not even parties to the appeal.

The crucial aspect of *Kelley*, which differentiates it decisively from *Alberti*, is the fact that in *Kelley*, there was no *ongoing* constitutional violation to which the state was a party. "Mandatory segregation by law . . . has long since ceased." 836 F.2d at 1000. The state defendants "are not threatening to enforce any unconstitutional act". 836 F.2d at 990.

By contrast, *Alberti* involves an ongoing constitutional violation. The petitioners were not being directed to correct the "lingering consequences" of past unlawful conduct, 836 F.2d at 1000, but to participate in the elimination of *current* constitutional transgressions. Moreover, unlike the state defendants in *Kelley*, the petitioners here are currently participants in continuing infractions: it is the petitioners' *present* policy of refusing to accept state-ready inmates timely into the state prison system which is causing the backlog or prisoners in the jails which, in turn, produces the unacceptable and unconstitutional conditions of incarceration there.

Even *Kelley* acknowledges that, "there is nothing improper about judges directing wrongdoers to pay for the righting of their wrongs." 836 F.2d at 997-98. That is all the courts below have done here. Nothing in *Kelley* suggests that "current constitutional violator[s]", *Alberti*, 937 F.2d at 1001, cannot be required to participate in the remedy designed to eliminate prospectively *ongoing*

constitutional abuses—even if the transgressor is a state official.

In this regard, *Alberti* is controlled by *Papasan v. Allain*, 478 U.S. 265 (1986). In that case, the Court explained that the Eleventh Amendment does not bar relief in cases where the order "ends the violation of federal law as opposed to cases in which that relief is intended indirectly . . . to meet third-party interests such as compensation." 478 U.S. at 278. Eliminating present constitutional violations was, of course, what this order was all about.

Moreover, whatever force *Kelley* might otherwise have possessed was undermined considerably by this Court's ruling in *Missouri v. Jenkins*, 495 U.S. 33, 56 n.20 (1990). In that case, the Court sanctioned the district court's order directing the state to fund part of the remedy decreed to eradicate the effects of past discrimination. If there is a "conflict", it is between *Jenkins* and *Kelley* (which differ concerning the propriety of directing a state to participate financially in a remedy intended to rectify the effects of past illegal conduct in the face of a claim of Eleventh Amendment immunity). *Jenkins* renders *Kelley*'s viability suspect, and certainly deprives it of sufficient credence to justify a grant of certiorari to resolve an asserted (but really non-existent) conflict between the sixth circuit's approach, as embodied in *Kelley*, and the fifth circuit's view on Eleventh Amendment issues, as explicated in *Alberti*.

The supposed conflict is more imagined than real, and it is really inconsequential at all events. It certainly does not justify a grant of certiorari to correct.

III. THE FIFTH CIRCUIT APPLIED THE CORRECT LEGAL STANDARD IN CONCLUDING THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT PETITIONERS ACTED WITH DELIBERATE INDIFFERENCE TO THE SERIOUS NEEDS OF THE INMATE PLAINTIFFS-RESPONDENTS

Petitioners maintain that they cannot be found to have acted with "deliberate indifference" to the serious needs of inmates in the Harris County jails, sufficiently to satisfy the "subjective component" of a constitutional violation, *Wilson v. Seiter*, ___ U.S. ___, ___, 111 S.Ct. 2321, 2324 (1991); *Hudson v. McMillian*, ___ U.S. ___, ___, 112 S.Ct. 995, 1006 (1992), because the appellate courts of Texas had not unequivocally condemned their actions prior to plaintiffs' lawsuit having been filed. "Until State courts had authoritatively construed [petitioners'] State-law duties," petitioners argue, Petition for Certiorari at p. 28, they cannot be found to possess the culpable mental state required by *Seiter*.

The argument is so flawed certiorari should not be granted to consider it. In the first place, it is entirely inaccurate to claim that the state courts had not "authoritatively construed" the petitioners' state-law duties as of the time the plaintiff-respondents filed their lawsuit against these defendants. On the contrary, *two* state courts decisions had construed the relevant provisions of state law (adversely to petitioners). See *County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas); *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas). *See also, Markham v. Tarrant County Texas Commissioner's Court*, 779 S.W.2d 872, 874 (Tex. App.—Fort Worth 1989, writ denied). Admittedly, those decisions were district court opinions which were being

appealed, but it is well settled that an appeal of a state court judgment "does not—unless and until reversed—detract from its decisiveness and finality". *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1949); *see also Rooker v. Fidelity Trust Co.*, 283 U.S. 413, 415 (1923) ("If the [state trial court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication"); *Reed v. Allen*, 286 U.S. 191 (1932); *Nixon v. Richey*, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975); *Petrella v. Siegel*, 843 F.2d 77, 80 (2d Cir. 1986).

Thus, the premise of petitioners' argument is demonstrably non-existent. There were two definitive, authoritative judicial decisions construing their state law duty at the time the district court made its "deliberate indifference" finding. Petitioners simply chose to ignore those rulings.

Further, months before the plaintiffs-respondents filed suit against the state defendants the federal district court had ruled twice (in litigation between the petitioners and the county defendants-respondents) that the petitioners bore partial responsibility for the objectively unconstitutional conditions in the Harris County jails. *See*, Order, May 12, 1989; Order, July 11, 1989. Neither of those rulings had been stayed, nor had petitioners sought § 1292(b) interlocutory appellate review. Thus, by the time plaintiffs-respondents filed suit against petitioners, there was nothing "uncertain" about the duty of petitioners to refrain from subjecting prisoners in the Harris County jails to objectively unconstitutional conditions there. Petitioners chose—deliberately—to ignore those adjudicated constitutional responsibilities.

Moreover, these rulings were consistent with the seven year old (at that time) precedent from the fifth circuit that state prison officials cannot avoid responsibility for providing constitutional housing for inmates by leaving them in unconstitutionally overcrowded local jails. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *see also Benjamin v. Malcolm*, 803 F.2d 46, 51 (2d Cir. 1986); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984).

Pie-in-the-sky hopes of appellate reversal do not undermine the deliberateness of the defendants' indifference to the serious needs of inmates pending an ultimately unsuccessful appeal, especially given the unbroken string of rejections of its argument petitioners had experienced. To this date (and as of 1989) petitioners have never persuaded a single court—state or federal—of their asserted non-responsibility for state-ready inmates housed in unconstitutionally overcrowded local county jails as a result of their deliberate decision intentionally to leave them there. To suggest in this context that their duty to refrain from condemning inmates to serve their sentences in unconstitutional local jails was "uncertain" is virtually incomprehensible.

At all events, petitioners *knew* when they adopted their Scheduled Admissions Policy and when they promulgated their "allocation" of prison admissions pursuant to TEX. REV. CIV. STAT. ANN. ART. 6166a (Vernon Supp. 1991), that the effect of those decisions—indeed, the objective thereof—would be to leave a significant number of state-ready convicted felons in the Harris County jails. That was a *deliberate* decision. State officials chose to condemn a portion of the state-wide prison-ready population to serve a portion (or in many cases, all) of their state sentences in the Harris County jails. To urge, as petitioners do here, that they could ignore the consequences of those decisions because they were "uncertain" of their obligation to avoid exacerbating unconstitutional overcrowding in the county's

jails is to demonstrate the very indifference the constitution forbids.

Regardless, the decisions of this Court establish clearly that state officials cannot avoid their constitutional duties by delegating their responsibilities to others. *West v. Atkins*, 487 U.S. 42, 56 (1989) ("Contracting out [prisoner care] does not relieve the State of its constitutional duty to provide adequate [care] to those in its custody"). Prison officials have a non-delegable constitutional obligation to take reasonable steps to avoid subjecting convicted felons and other prisoners for whom they are ultimately responsible to clearly unconstitutional conditions of confinement. *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Youngberg v. Romero*, 457 U.S. 307 (1982). That petitioners failed to do so here is undeniable. To excuse that dereliction on grounds of that no state court had definitively ruled that the petitioners were required to assume responsibility for the constitutional consequences of their policy choices would transform the "deliberate indifference" standard into an open invitation to avoid constitutional duty.

Owen v. City of Independence, Mo., 445 U.S. 622 (1980), establishes that ignorance (or uncertainty) of the law is not a defense available to governmental defendants sued under § 1983 in their official capacities. Section 1983 was intended "to serve as a deterrent against future constitutional violations . . . [and t]he knowledge that a [governmental defendant] will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52.

If the duty was "uncertain", it was the responsibility of the petitioners to err on the side of protecting constitutional rights. Their proposed new rule—requiring a definitive opinion from a state court of last resort as a prerequisite to a finding of "deliberate indifference"—would stand that principle on its head.

Understandably, no court has ever adopted (or even hinted at the acceptability of) such a rule. Nothing in *Seiter*, *Hudson*, the Eleventh Amendment, *Pennhurst*, the Eighth Amendment, any other part of the constitution, or any other decision of this Court would require, or even allow, that result. Certiorari should not be granted to consider such a novel and insupportable extension of existing law.

IV. THE COURT OF APPEALS JUDGMENT CAN BE AFFIRMED ON ALTERNATE GROUNDS BASED ON THE "DUE PROCESS" STANDARDS APPLICABLE TO PRE-TRIAL DETAINEES (RATHER THAN THE EIGHTH AMENDMENT "DELIBERATE INDIFFERENCE" INQUIRY CONTROLLING DETERMINATION OF CONSTITUTIONAL CLAIMS OF CONVICTED INMATES)

Plaintiffs-respondents have consistently maintained, and continue to insist, that *Wilson v. Seiter*'s "deliberate indifference" standard is not the proper measure of constitutional evaluation in this case because the rights of pre-trial detainees incarcerated in the jails are implicated, too. Those inmates' rights are controlled by the Due Process Clause, rather than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979).

Just last term this Court recognized the difference in standards between claims arising under the eighth amendment (governing the rights of convicted prisoners)

and those involving the treatment of pretrial detainees (controlled by Due Process Clause principles). *Collins v. City of Harker Heights, Texas*, ___ U.S. ___, ___, 112 S.Ct. 1061, 1069-70 (1992) ("We have held, for example, that *apart from the protection against cruel and unusual punishment provided by the Eighth Amendment*, cf. *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978), the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, see *Bell v. Wolfish*, 441 U.S. 520, 535, n.16, 545, 99 S. Ct. 1861, 1872, n.16, 1877, 60 L.Ed.2d 447 (1979)"). *Alberti* is a mixed prison/jail case, since both pretrial detainees and convicted felons awaiting transfer to the state prison are incarcerated there.

With regard to the pretrial detainees, who are being subjected to objectively unconstitutional conditions of incarceration in the Harris County jails, issues of "deliberate indifference" are largely beside the point. Moreover, the court of appeals never reached this issue, since in affirmed the petitioners' responsibility even under the more stringent standards of the eighth amendment.

Nevertheless, these circumstances further counsel against a grant of certiorari in this case, since even if the Court were to agree with petitioners' position on the "deliberate indifference" issue, there would still be an adequate basis for affirming the court of appeals' judgment on the basis of Due Process principles applicable to pretrial detainees. Admittedly, the court of appeals has never addressed this aspect of the case, despite its having been repeatedly urged by plaintiffs'-respondents, so a reversal of the court below would not finally resolve this dispute, but only lead to a remand to the court of appeals for consideration of the role of the Due Process Clause and the rights of pretrial detainees in this case.

The procedural posture of this case, therefore, renders it an inappropriate vehicle for explication of the questions presented by petitioner. Should the Court grant certiorari, however, it will have to consider whether the Due Process Clause or the Eighth Amendment controls the inquiry in cases of this sort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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